Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HERBERT S. MONCIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

HERBERT S. MONCIER
Counsel of Record
550 West Main St. Suite 775
Knoxville, Tennessee37902
(865) 546-7746
Supreme Court Bar # 46360

February 22, 2010 *Counsel for Petitioner*

QUESTIONS PRESENTED

1. Is Petitioner protected from being charged with criminal contempt for conduct he reasonably believed was required by his ethical and Constitutional duties as an attorney-advocate for his Client?

2. Does Petitioner have a right to a jury trial for criminal contempt after repeal of prior "petty offense" classification; re-classification of contempt; and new guideline sentence for contempt provided for in the Ominous Crime Act of 1984 and this Court's opinions in *Jones*, *Apprendi* and *Blakely*?

3. Was Petitioner denied his structural constitutional right to an impartial judge by the Sixth Circuit Opinion denying Petitioner defenses at a new trial based on a record that was created before a district judge that was disqualified?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals for the Sixth Circuit were Petitioner, Herbert S. Moncier and Respondent, the United States of America.

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 571 F.3d 593 (6th Cir. 2009). (Pet. App. 1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fed. R. Crim. P. 42(c)(3).

Rule 42. Criminal Contempt

(c)(3) *Trial and Disposition.* A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

28 U.S.C. § 455

§ 455. Disqualification of justice, judge, or magistrate [magistrate judge]

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
. . .
(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

. . .

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

. . .

(e) No justice, judge, or magistrate [magistrate judge] shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

JURISDICTION

On July 8, 2009, the Court of Appeals issued its decision reversing Petitioner's conviction for criminal contempt and remanding for a retrial. (Pet. Appx. 1)

A petition to rehear was denied on September 24, 2009. (Pet. Appx. 16)

On December 15, 2009 Justice Stevens granted an extension of the time to file a petition for a writ of certiorari to February 21, 2010. (Pet. Appx. 17)

Although there is no final judgment below, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), which provides "cases in the courts of appeals may be reviewed by the Supreme Court by ... writ of certiorari granted upon the petition of any party to any civil or criminal case, *before or after rendition of judgment or decree*." (emphasis added). *See Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

STATEMENT OF THE CASE

The FBI conducted an investigation it called "Rose Thorne" since approximately 2000 in the Greeneville Division of the Eastern District of Tennessee. Petitioner, a criminal defense attorney, had successfully represented a number of defendants at trial in the Greeneville Division, some of who had been indicted out of the "Rose Thorne" investigation.

Petitioner represented Michael Vassar since October 4, 2005. Vassar was charged in two indictments. One count was severed resulting in Vassar facing three separate jury trials before District Judge J. Ronnie Greer. Vassar was acquitted at his first jury trial in February 2006.

Petitioner was retained by a Mike Gunter to represent Gunter at a trial in a separate case. Petitioner was also hired by a Harold Grooms, who had not been charged but was being investigated in "Rose Thorne" but Grooms has not been charged to date.

Before conferring with Gunter or Grooms, Petitioner first conferred with Vassar and assured himself there was no potential of a conflict with Gunter or Grooms. Petitioner then conferred with Gunter and Grooms who also had independent counsel. Petitioner and independent counsel for both Gunter and Grooms determined there was no potential conflict. As a precaution, because the three knew each other and were from the same community, Petitioner obtained written acknowledgments and waivers from all three clients. Gunter and Grooms each continued to have independent counsel to represent them in the event a conflict arose in the future preventing Petitioner from representing them at trial.

In March 2006, Petitioner advised the Court and prosecutors that he represented Gunter and Grooms. *Sua sponte* hearings as to potential conflicts were ordered and held in March and April 2006. Vassar testified under oath and denied any knowledge of criminal activity of Gunter or Grooms. Gunter also testified denying any knowledge of criminal activity of Vassar. The prosecutors provided no information to the Court or to Petitioner of any potential conflict.

The Court determined there was no conflict between Petitioner representing Vassar and Petitioner represented uncharged Grooms. The Court disqualified Petitioner from representing Gunter in a separate case because Gunter was also charged as a co-defendant with Vassar but was represented by separate independent counsel. Petitioner returned Gunter's fee. Gunter was

found not guilty of being in a conspiracy with Vassar. In Gunter's separate trial Gunter was convicted. At no time did Petitioner seek Fed. R. Crim. P. 44(c) joint representation of two defendants in one case.

The prosecutors dismissed the charge against Vassar set for the second jury trial.

In his third jury trial, Vassar was acquitted of conspiracy to distribute over 5 kilograms of cocaine; acquitted of conspiracy to distribute over 500 grams of cocaine; but convicted of conspiracy to distribute less than 500 grams of cocaine and a substantive count of delivery of 6.61 grams of cocaine for $125.00.

A complex sentencing proceeding followed. The Government sought a 27-year sentence relying on trial testimony for acquitted conduct. Petitioner asserted Vassar's guideline sentence was 12 months.

Petitioner filed motions, supported by a transcript of a tape recording, asserting that prosecutors had threatened a witness, Thornton, to testify falsely against Vassar.

Petitioner filed motions for the District Judge to disclose information known to the District Judge but unknown to Vassar from search warrants, filings under seal in Vassar and co-conspirator's cases, and sentencing materials in co-conspirator's cases that were material to disputed sentencing factors in Vassar's case.

Petitioner also filed motions charging misconduct by prosecutors unlawfully manipulating sentence guideline calculations up to 500% lower, before USSG §§ 3E1.1 and 5K1.1 reductions. Petitioner asserted that as a remedy, either the indictment should be dismissed for selective sentencing or that Vassar should be provided

the same percentage reduction pursuant to 18 U.S.C. 3553(a)(6) to avoid unwarranted sentence disparity.

Petitioner subpoenaed witnesses who were in federal custody to the sentencing hearing on November 17, 2006, including Thornton, to support allegations of prosecutorial misconduct. Because Petitioner was required to obtain transport orders for the U.S. Marshall, the prosecutors knew Petitioner had the witnesses present to testify on November 17th.

The day before the sentencing hearing, on November 16th, 2006, the prosecutor faxed a letter to Petitioner. The letter included a statement that the prosecutor's star witness, whom Petitioner had subpoenaed to testify at the November 17th hearing, had admitted to committing perjury at Vassar's trial. [Pet. Appx: ***] The letter also stated that another witness, Shults, had given the prosecutors information that Vassar was badly addicted to drugs which was one of Vassar's defenses at trial and at sentencing.

In addition to the favorable evidence disclosed and for reasons that have to date never been explained, the prosecutor in the November 16th letter asserted that Vassar, two years earlier while in jail in 2005, had made a statement to alleged co-conspirator Thornton that implicated Petitioner's client, Grooms.

Vassar was in federal custody approximately 2 hours away from Petitioner. All telephone calls were monitored. Prior to court on November 17th Petitioner provided Vassar a copy of the prosecutor's letter. Petitioner also provided Vassar a letter that Petitioner intended to request the Court to appoint independent counsel to confer with Vassar about the disclosure and, if the information were true, to consider seeking sentencing benefits available to Vassar by cooperating

against Grooms. Petitioner informed Vassar that Petitioner would not discuss the contents of the letter with Vassar prior to Vassar having independent counsel.

The statement in the November 16th letter was later denied by both Vassar and Thornton. To date, the Government has never provided any documentation that supports the alleged statement that Thornton had provided such information in 2005.

The November 16th letter that brought about Petitioner's actions on November 17th has, to date, never been mentioned in any proceeding against Petitioner, including Petitioner's conviction for contempt in the instant case; Petitioner's subsequent suspension from federal practice for seven (7) years by disciplining District Judge Curtis L. Collier; the Sixth Circuit Opinion denying Petitioner the right to present defenses at his new trial; or the Sixth Circuit Opinion by the same panel affirming that suspension. Nor has any Court addressed the suspicious timing of the prosecutor's letter the day before the sentencing hearing wherein Petitioner was calling Thornton to testify against the prosecutors.

Prior to the sentencing hearing on November 17th, Petitioner notified the Court that he needed to be heard. Petitioner first moved the Court to appoint independent counsel to confer with Vassar about the November 16th disclosure. That request was denied. Petitioner next requested the Court to refer the matter to a judge who would not be sentencing Vassar to confer with Vassar about the new disclosure. That motion was denied.

The prosecutor announced he was not interested in Vassar's cooperation against Grooms, raising

additional concerns as to why the prosecutor placed the statement about Grooms in the November 16th letter.

Petitioner and Vassar had planned the sentencing hearing prior to the November 16th letter. Petitioner had Thornton present under subpoena to testify about threats the prosecutor had made to him. Petitioner, however, did not know what Thornton would say about the alleged 2005 statement the prosecutor attributed to Thornton in the November 16th letter.

During a recess shortly before lunch, as Vassar was being taken from the defense table to the lockup, Vassar told Petitioner he wanted Petitioner to go forward with the sentencing hearing. After the recess, Petitioner informed the Court that Petitioner would confer with Vassar over the lunch break and be ready to proceed to the sentencing hearing after lunch.

The Court called Vassar and Petitioner to the podium. At that time Vassar had no advice concerning the risk facing him if he proceeded to the sentencing hearing as planned prior to the November 16th letter. Nor had Vassar received any advice as to the significance or consequences of that information if true. There had been no determination that there was a conflict and the prosecutor had already stated Vassar's cooperation would not be accepted even if the statement were true.

The Court began to present a series of hypothetical questions to Vassar. The Court changed the hypotheticals as the questions proceeded. Vassar was obviously getting confused. Hypotheticals being used by the Court in its questions to Vassar were not factually correct. Petitioner stated objections.

Because Petitioner believed Vassar should have independent counsel, Petitioner had not inquired of

Vassar whether the statement attributed to him in the November 16th letter about Petitioner's other client, Grooms, was true. Depending upon the answer to that question, Vassar faced significant risks from the Court's questioning:

(1) Vassar had previously testified under oath during the March and April 2006 hearing that he did not know of any criminal activity of Grooms. If in response to the Court's questions, Vassar now acknowledged the information in the prosecutor's letter about Grooms was true, Vassar would have incriminated himself for perjury and obstruction of justice; adjustments could be made to his Guideline sentence calculation for obstruction; or, at a minimum, Vassar would have provided evidence against himself that could be weighed against Vassar in 18 U.S.C. §3553(a) sentencing factor determinations.

(2) Petitioner had represented to the Court in March and April 2006 that before agreeing to represent Grooms, Vassar told Petitioner that Vassar had no knowledge about any illegal activity of Grooms. If Vassar's purported communication to Thornton about Grooms was true, Petitioner became a potential witness against Vassar.

(3) The new information, if true, conflicted with the planned sentencing defense on November 17th that Vassar did not have knowledge about others, including Grooms, that prosecutors insisted Vassar must provide to implicate if he was offered cooperation.

(4) If Petitioner proceeded with the sentencing hearing as planned prior to the November 16th letter, before investigating the new allegation and before conferring with Vassar, if Petitioner called Thornton to testify about threats made by the prosecutor, during

cross-examination the prosecutor would ask about the alleged 2005 Vassar communication about Grooms.[1] If Thornton admitted the communication, Vassar would be subject to an increased sentence for obstruction of justice by reason of Vassar's March and April 2006 sworn testimony.

Vassar had received no advice pertaining to questions the Court was propounding or actions the Court could take based on Vassar's answers to questions propounded. Vassar had received no advice that the Court was attempting to obtain a waiver of Vassar's Constitutional right to conflict-free counsel before Petitioner had an opportunity to determine whether the new information was true and whether Petitioner had an actual conflict. Vassar had received no advice that he could request the Court to allow him to confer with and obtain the advice of Petitioner during questions being propounded by the Court.

It was during these exigent circumstances and imminent risks to Vassar, that Petitioner asked "May I speak to my -- [Client]." The colloquy that resulted in Petitioner's conviction for contempt was as follows:

Mr. Moncier: Once again your honor --
The Court: Mr. Moncier --
Mr. Moncier: He makes --
The Court: Mr. Moncier, you be quiet.
Mr. Moncier: May I approach the bench?
The Court: You may stand there and do what I told you to do until Mr. Vassar answers this question.
Mr. Moncier: For the record, your Honor, I object with him having --

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[1] This District Judge generally does not limit cross-examination to the subject of direct.

The Court: Mr. Moncier, one more word and you're going to jail.
Mr. Moncier: May I speak to my -- [Client][2]
The Court: Officers, take him into custody. We'll be in recess.
[12:47 p.m.]

[Pet. Appx. 68-69]

Petitioner was placed in jail; disqualified from representing Vassar; and cited by the Court for criminal contempt. [Pet. Appx. pp. 23-36]

While the contempt citation against Petitioner was pending the Court appointed Vassar new counsel. At a hearing with Vassar and his new counsel on January 29, 2007, the Court reinstated Petitioner as Vassar's attorney and Petitioner represented Vassar at sentencing hearing on February 12, 2007.

On May 30, 2007 the Court found Petitioner guilty of criminal contempt of court under 18 U.S.C. § 401(1) and 401(3) for violating his directive "Mr. Moncier, one more word and you're going to jail."

On August 27, 2007 the Court sentenced Petitioner to one-year probation; a fine of $5,000.00; 150 hours of community service; 3 extra hours of ethics CLE; and completion of an anger management course. [Pet. Appx. 18-28]

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2 The typed transcript does not contain [Client] after "--". Petitioner added [Client] in brackets because that is what Petitioner was attempting to say. The court reporter did not either hear Petitioner say "Client" or Judge Greer spoke over Petitioner. Judge Greer had already prohibited Petitioner from speaking to the Court. Petitioner's use of the possessive pronoun "my" could only relate to "Client."

Petitioner moved to stay the sentence. The Court denied a stay except to permit Petitioner to deposit the $5,000.00 fine with the Clerk pending appeal.

The Sixth Circuit held that Judge Greer was disqualified pursuant to Fed. R. Crim. P. 42(a)(3), reversed Petitioner's conviction and remanded for a new trial. [Pet. App. Opinion p. 9, part B]

The Sixth Circuit limited Petitioner from asserting any issue raised on appeal at his new trial based on the record from the contempt trial for which Judge Greer was disqualified. [Pet. Appx. p. 15]

REASONS FOR GRANTING THE PETITION

I. Petitioner is protected from prosecution for criminal contempt for conduct he reasonably believed was required by his ethical and Constitutional duties as an attorney-advocate for Vassar.

In *Sacher v. United States,* 343 U.S. 1, 14 (1952), this Court held:

> But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

At Petitioner's sentencing on August 27, 2007 Judge Greer began by stating:

> The Court: A simple statement, Judge, I made a mistake, I'm sorry, would have ended this matter a long time ago, but for some reason, Mr.

> Moncier, you're not able to say those words. You're not able to say, I made a mistake.[3]

The "mistake" Judge Greer said Petitioner made was Petitioner requesting permission from Judge Greer "May I speak to my client?" after Petitioner had been instructed not to approach the bench to argue objections and not to state any further objections as Judge Greer was requiring Petitioner's client to answer questions about a subject the client had previously been questioned by Judge Greer under oath.

Almost 300 pages have now been written about Petitioner's "mistake." Petitioner was convicted of contempt of Court and was stripped of 70% of his law practice that was in federal courts for his "mistake."[4]

No court to date, however, including the Judge Greer; the Magistrate-Judge conducting Petitioner's disciplinary hearing; the District Judge suspending Petitioner from federal practice for seven years; or the Sixth Circuit panel in two opinions, has addressed

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[3] Judge Greer had apparently forgotten Petitioner, before was returned to the Courtroom from jail on November 17, 2006, instructed an attorney appearing for him to apologize to the Court and that attorney told Judge Greer "Mr. Rogers: Before I go on, Your Honor, though I want to make it clear to you that Moncier has expressed to me in the brief time that I spent with him the fact that he was only trying to make an objection; that he intended no disrespect to the court at that time and that he is very sorry that by, by, by attempting to utter his statement that he violated this Court's order when he felt he was compelled to do so."

[4] Petitioner has filed a Petition for Certiorari from his discipline for his conduct before Judge Greer on November 17th in *In re Herbert S. Moncier*, Supreme Court _____ Application 09A583. In that Petition, Petitioner presents this issue in the context of whether Petitioner can be disciplined for conduct reasonably believed to be required by his ethical and Constitutional duties to Vassar.

Petitioner's assertion that his request was not a "mistake" but was reasonably necessary to provide Vassar's Sixth Amendment right to counsel and perform Petitioner's ethical duties to Vassar.

Whether Petitioner made a "mistake" by making the decision to request permission to speak to his client under adverse circumstances in a serious criminal case within a split second as his client was being questioned by the judge goes to the core of what this Court described in *Sacher* as "fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever." *Sacher*, 343 U.S. at 14.

The Sixth Circuit Opinion Is In Conflict With This Court's Opinions And Opinions Of Other Circuit Courts Of Appeals

In *Maness v. Meyers*, 419 U.S. 449 (1975), an attorney had advised his client to disobey an order of a judge to produce documents the attorney believed were protected by the Client's Fifth Amendment privilege. This Court first discussed the general rule that an attorney does not have the right to disobey a court order. This Court then established an exception to the general rule that is applicable to Petitioner's actions in this case.

> Thus the issue is whether in a civil proceeding a lawyer may be held in contempt for counseling a witness in good faith to refuse to produce court-ordered materials on the ground that the materials may tend to incriminate the witness in another proceeding. We hold that on this record petitioner may not be penalized even though his advice caused the witness to disobey the court's order.

> The privilege against compelled self-incrimination would be drained of its meaning if counsel, being lawfully present, as here, could be penalized for advising his client in good faith to assert it. The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion. If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence. *id.*
>
> . . .
>
> We are satisfied that petitioner properly performed his duties as an advocate here, and he cannot suffer any penalty for performing such duties in good faith. *id. 557*

In this case the Judge was questioning Petitioner's client just prior to his sentencing hearing. Petitioner requested to approach the bench to argue objections so as to not be accused of "coaching" his client. Petitioner was instructed to "stand there and do what I told you to do until Mr. Vassar answers this question." Petitioner then, from the podium, attempted to state an objection and was instructed "Mr. Moncier, one more word and you're gong to jail." Being unable to state or argue objections, Petitioner requested "May I speak to my client?"

The Sixth Circuit Opinion failed to address, cite or apply this Court's opinion in *Maness*. Instead, the Sixth Circuit Opinion strictly applied the general rule that an order cannot be disobeyed without risk of contempt. According to the Sixth Circuit:

> Mr. Moncier's contention, specifically, is that his "duty to confer and advise Vassar necessarily included potential obstruction of Judge Greer questioning Vassar in the presence of the prosecutor and FBI[.]" *Moncier br.* at 5. The Tennessee Association of Criminal Defense Lawyers make much the same contention in its *amicus* brief supporting Mr. Moncier. The idea appears to be that, had Mr. Moncier not thrown himself across the tracks on November 17, Mr. Vassar's constitutional rights would have been violated. And thus, we are told, it was appropriate, and event necessary for Mr. Moncier, rather than Judge Greer, to take control of the courtroom.
>
> To all of which there is a simple answer: There is no right of revolution in a United States District Court. The lawyer's duty is not to defy the judge's orders, but to follow them. It is true enough that judges, like other humans, will make mistakes, and that those mistakes will sometimes be to the detriment of a client's rights. But that is what Circuit Courts exist to remedy. "Lawyers are required to obey even incorrect orders; the remedy is on appeal." *In re Dellinger*, 502 F.2 813, 816 (7th Cir. 1974). We entirely agree with Judge Greer that "someone must be in control of, what happens in a courtroom," and that the someone is "the trial judge, not the lawyer for a criminal

> defendant nor the lawyer for the United States."

Petitioner urges this Court to hold that under the exigent circumstances in this case, Petitioner's simple request for permission of a judge to speak to his client cannot fairly be characterized as throwing "himself across the tracks." Nor does Petitioner's request equate to his taking "control of the courtroom" or participating in a "revolution."

The Sixth Circuit Opinion conflicts with the standard of the Seventh Circuit for holding an attorney-advocate in contempt.

> Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows. Given this extreme liberality necessary to a vital bar and thus the effective discovery of truth through the adversary process, an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.

In re Dellinger, 461 F.2d 389, 400 (7th Cir. 1972)(emphasis added).

Requesting permission to perform a constitutional or ethical duty to confer with and advise a defendant in a serious criminal proceeding, in the heat of a controversy, can hardly be considered "exceeding the outermost limits of his proper role and hindering rather

than facilitating the search for truth." *Dillinger*, 461 at 400.

In *Sacher v. United States*, 343 U.S. 1, 14 (1952), this Court held:

> But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever.

In *In re McConnell*, 370 U.S. 230, 239 (1962) this Court held:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.

Petitioner had a duty to confer and advise Vassar as to the consequences of his answers to the Court's questions; to assert a Fifth Amendment privilege if necessary; and to object to an unresolved potential conflict of interest to preserve that issue for appellate review. *see Mickens v. Taylor*, 535 U.S. 162, 168 (2002) and *Holloway v. Arkansas*, 435 U.S. 475 (1978).

Eastern District of Tennessee Local Rule 83.6 required Petitioner to comply with Tennessee Rules of Professional Conduct in representing Vassar. Petitioner's duties to Vassar regarding the Court's questions are set out in EDTN 83.6, RPC Preface, 1.1, 1.2(d), 1.3, 1.4, 1.14, 1.16, 2.1, 3.1, 3.3, 3.4, and 3.5.

Copies and a truncated statement of these rules is contained in the Appendix.

One of Petitioner's duties was to confer and advise Vassar. Tenn. Sup. Ct. Rule 8, RPC 1.4(b); 2.1. This duty became particularly important in Vassar's proceeding where the Court was questioning Vassar on matters he had previously testified to under oath; in the presence of prosecutors, FBI agents and presentence officers; and immediately prior to deciding on a sentence for Vassar.

The District Judge described his statement to Petitioner "Mr. Moncier one more word and you're going to jail" as "a direct, unequivocal command for silence." [R.44:M&O,J.A.209] It is undisputed that Petitioner was requesting to speak to Vassar when Petitioner spoke the words "May I speak to my -- [Client]." There is no suggestion that Petitioner uttered the words in a loud tone or sarcastic manner.

Petitioner was charged with contempt for uttering words, not for the content, manner or purpose of the words uttered. Curiously, Judge Greer in his Order convicting Petitioner recognized Vassar's right to confer with, and have Petitioner's advice.

> Such a request [by Vassar to speak to Petitioner] would likely have been granted and would not have violated the Court's command to Moncier for silence. [Pet. App. Order pp. ***]

Petitioner's crime was requesting permission to provide Vassar the constitutional and ethical rights Judge Greer would have granted Vassar had Vassar made the request himself. Vassar's right to request to speak to Petitioner, and Petitioner's duty to confer and

advise Vassar, are indistinguishable. Neither is superior to the other.

The Court apparently believed Petitioner's duty to confer and advise Vassar was only triggered upon Vassar's request. *compare* Tenn. Sup. Ct. Rules, RPC 2.1(duty to advise the client if the client's course of action is related to the representation when doing so appears to be in the client's interest); Fed.R.Crim.P. 51(b) duty to object; Fed.R.App.P. 36(a) failure to object; *Mickens v. Taylor*, 535 U.S. 162, 168 (2002); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *United States v. Vonner*, 516 F.3d 382 (6th.Cir.2008).

Federal dockets are filled with defendants asserting they were denied the effective assistance of their counsel. Ironically, Petitioner is charged with criminal contempt for attempting to provide his client more assistance of counsel than the District Judge believed Vassar was due.

The Sixth Circuit Opinion also failed to consider the "actual obstruction" requirement of this court established *In re McConnell.* There was no jury present. The Court could have responded to Petitioner's request with a simple "yes" or "no" with far less disruption of the proceedings than occurred as the result of the contempt.

Vassar was traveling on a slippery slope when being required to answer the Judge's questions where his attorney could not object, argue or advise Vassar. *Maness* requires that before Petitioner can be charged with contempt, it must be determined that Petitioner was not performing a duty he reasonably believed was owed to Vassar.

The Court began Petitioner's sentencing hearing by stating "A simple statement, Judge, I made a

mistake, I'm sorry, would have ended this matter."[5] [Pet Appx. pp. 63-66]. Regardless of the fact that Petitioner did apologize to Judge Greer, an attorney's failure to apologize to a court is insufficient to constitute or form the basis for contemp. *In re Snyder*, 472 U.S. 634 (1985)

Under the restrictions the District Judge imposed, Petitioner being present served only to provide an illusory appearance of Vassar having counsel while being questioned. If Petitioner could not object and could not confer or advise Vassar until Vassar answered the Court's questions, there was no reason for Petitioner to be present. The Court's directives was the equivalent of ordering Petitioner removed from the Courtroom or the District Judge continuing his questions of Vassar after Petitioner was placed in jail.

This Court in *United States v. Gonzalez-Lopez,* 548 U.S. 140 (U.S. 2006), held that the denial of a defendant's counsel of choice constituted a structural defect in the proceeding that was complete upon its occurrence requiring reversal without any requirement of a showing of prejudice.

The District Judge's directives to Petitioner not to approach the bench; not to object; and not confer or advise to Vassar until Vassar answered the Court's questions was the functional equivalent of the denial of counsel and pursuant to *Gonzalez-Lopez* was a completed constitutional structural defect in the proceeding.

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[5] The first thing Petitioner requested his attorney say to Judge Greer upon being returned to the Courtroom on November 17th was that Petitioner was deeply sorry that the Court construed Petitioner's attempts to state objections for Vassar were viewed by the Court as contempt. [App. Trans. pp. *****]

Sacher "Protections"

This Court in *Sacher* spoke in terms of "protecting" advocates representing clients in criminal proceedings. The Court, however, did not specify what judicial mechanism would protect the advocate-attorney.

This Court has provided afforded judges "judicial immunity"; prosecutors "prosecutorial immunity"; and law enforcement officers "qualified immunity." Petitioner requests this Court grant the Petition to provide defense attorneys "advocate immunity" to implement the protections this Court required in *Maness, Sacher* and *In re McConnell.* "Advocate immunity" for defense attorneys is consistent with other federal common-law "immunities" afforded other participants in judicial proceedings.

Justification

In *Brogan v. United States*, 522 U.S. 398, 405, (1998) this Court quoted with approval from *Corpus Juris Secunum*, Crimlaw §56 that:

> Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law. See, e.g., 2 P. Robinson, Criminal Law Defenses §142(a), p. 121 (1984) ("Every American jurisdiction recognizes some form of law enforcement authority justification")[6].

Petitioner had duties imposed on him by the Constitution and ethical rules of the Court. If Petitioner reasonably believed he was performing those duties as

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[6] This compliance with the law "justification" defense is different from the "justification" defense defined in Sixth Circuit Pattern Jury § 6.07.

an advocate for his client at the time Petitioner asked "May I speak to my client" then *Brogan* justified Petitioner making that request. Criminal prohibitions of 18 U.S.C. § 401, just as with a law enforcement officer, do not apply where Petitioner's acts were done in compliance with the duties imposed on Petitioner by the Constitution by EDTN LR 83.6/RPC.[7]

Law Enforcement Qualified Immunity

This Court created federal common law "qualified immunity" for law enforcement officers where the actions "do not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mitchell v. Forsyth,* 472 U.S. 511 (U.S. 1985).

Petitioner asserts that applying the *Mitchell* qualified immunity test, a reasonable criminal defense attorney would not understand that the act of asking to speak to his client was contemptuous. Further, under the *Mitchell* standard, a reasonable criminal defense attorney would not have known that a request for clarification of the Court's directive would constitute a violation of the directive.

Even the Government recognized that Petitioner could lawfully speak after the District Court's directive to "stand there and not say another word until your client answers my question." According to the Government, Petitioner should have said "your Honor, Mr. Vassar is indicating that he wishes to consult with me before he responds." [Gov. 6th Cir. Response Brief, p. 39]. A reasonable criminal defense attorney would discern no meaningful difference between that

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[7] Defenses of "coercion" and "necessity" to protect Vassar may also apply.

supposedly lawful request and "May I speak to my client?"

Similarly, Petitioner asserts that Congress did not intend the contempt statute, 18 U.S.C. § 401, to punish effective advocacy. If that intent is unclear, the rule of lenity should be applied.

> The rule of lenity applies only if, "after seizing everything from which aid can be derived," . . . we can make "no more than a guess as to what Congress intended." *United States v. Wells*, 519 U.S. 482, 499, 137 L. Ed. 2d 107, 117 S. Ct. 921 (1997) (quoting *Reno v. Koray*, 515 U.S. 50, 64, 132 L. Ed. 2d 46, 115 S. Ct. 2021 (1995), *Smith, supra*, at 239, and *Ladner v. United States*, 358 U.S. 169, 178, 3 L. Ed. 2d 199, 79 S. Ct. 209 (1958)). To invoke the rule, we must conclude that there is a "'grievous ambiguity or uncertainty' in the statute." *Staples v. United States*, 511 U.S. 600, 619, n. 17, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994) (quoting *Chapman v. United States*, 500 U.S. 453, 463, 114 L. Ed. 2d 524, 111 S. Ct. 1919 (1991).

Muscarello v. United States, 524 U.S. 125, 138-139 (U.S. 1998).

18 U.S.C. § 401 is ambiguous as to whether Petitioner's attempts to perform constitutional and ethical duties to his client were prohibited. Whether springing from an application of the rule of lenity, qualified immunity or "advocate" immunity, this ambiguity must be resolved in Petitioner's favor.

Judicial Immunity

In *Pierson* v. *Ray*, 386 U.S. 547, 554, (1967) this Court held judicial immunity serves the public interest in judges who are "at liberty to exercise their functions with independence and without fear of consequences." The same public interest applies to criminal defense attorneys who are acting to protect the constitutional rights of their clients. *see Maness v. Meyers, supra.*

Prosecutorial Immunity

In *Imbler v. Pachtman,* 424 U.S. 409, 422-423 (U.S. 1976), this Court held "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." Once again, the same is true of an attorney charged with the constitutional duty to defend a citizen accused of crime.

Constitutional And Ethical Duties To Clients Are Often "Obstructive"

Petitioner had a clearly established ethical and constitutional duty to confer and advise Vassar as Vassar was being compelled to answer questions that had serious adverse implications to Vassar.

As discussed *supra*, the Sixth Circuit Opinion belittles the concept that an attorney's ethical or constitutional duty to a client may justify "obstructing" the Court's questioning of Vassar. The Opinion places

the District Judge's directive superior to the constitutional rights of Vassar.

The notion that an attorney can be convicted of contempt for advising a client to disobey an order requiring him to incriminate himself was specifically rejected by this Court in *Maness*. The "obstruction" argument regarding attorneys was also made, and rejected in *Miranda v. Arizona*, 384 U.S. 436, 441 (1966) regarding attorneys advising clients during questioning by police.

> If the individual desires to exercise his privilege, [representation by counsel] he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath-to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

Conclusion

Petitioner suggests that most lawyers and Americans, when informed Petitioner was convicted of criminal contempt for asking a court for permission to "speak to my client" would say "Isn't that what an attorney is supposed to do?"

The Sixth Circuit Opinion is in conflict with this Court's opinions in *Maness*, *Sacher* and *In re McConnell* and the Seventh Circuit Opinion in *In re Dellinger*.

Petitioner requests this Court grant his Petition to consider whether he is immune from being charged with criminal contempt for conduct that was reasonably intended to protect a constitutional right, or to perform an ethical duty, as an advocate for his client in a criminal proceeding.

II. Petitioner was denied his Sixth Amendment right to a jury trial.

The Sixth Circuit Opinion did not address Petitioner's claim that he was denied his Sixth Amendment right to a jury trial. The Opinion, however, at page 10, in one sentence, simply held Petitioner could not raise claims made on appeal at a new trial and in an all-inclusive ruling held "We have considered all of those arguments [Petitioner's claims on appeal], and with the sole exception of the one made under Rule 42(a)(3) [disqualification of the trial judge], we reject all of them on the merits."

With this ruling, the rule of law in Petitioner's case, although not addressed on appeal, is that Petitioner is not entitled to a jury trial and Petitioner will be denied a jury trial at his new trial. Further, Petitioner may be denied appellate review of any new conviction by a judge at a new trial because the issue was previously "decided" in this appeal.

Jones, Apprendi and Blakely Require A Jury Trial

Petitioner asserts the Sixth Circuit Opinion denying a jury trial would be in conflict with this Court's opinions in *Jones v. United States; Apprendi v. United*

States; and *Blakely v. Washington.*[8] These decisions of this Court have re-affirmed the Sixth Amendment constitutional right to a jury trial to require any fact necessary for a judge to increase punishment, other than convictions or beyond those facts admitted by the defendant or established by the jury's verdict, be decided by a jury.

The District Judge could not sentence Petitioner for contempt without first making factual findings necessary for the District Judge to convict Petitioner. It is constitutionally illogical to provide Petitioner a right to a jury trial for factual determinations necessary to increase punishment, but deny Petitioner a jury trial for a crime, the conviction of which is required to impose any sentence.

Petitioner requests this Court grant the Petition to hold that the Sixth Circuit's Opinion denying Petitioner a jury trial is in conflict with this Court's opinions in *Jones, Apprendi* and *Blakely.*

A Jury Trial Is Required By The Guideline Sentence And Classification Of The Offense Of Criminal Contempt

Petitioner further requests this Court grant the Petition to determine whether prior jurisprudence of this Court pertaining to contempt and petty offense law is no longer applicable to criminal contempt after the Sentencing Guidelines and new classification of offenses.

In *Bloom v. State of Illinois,* 391 U.S. 194, 88 S.Ct. 1477, 1480 (1967), this Supreme Court held:

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[8] *Jones v. United States,* 526 U.S. 227 (1999); *Apprendi v. New Jersey,* 530 U.S. 466 (2000); *Blakely V. Washington,* 542 U.S. 296 (2004)

> [S]erious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution. ... [id. 198] Our experience teaches that convictions for criminal contempt, not infrequently resulting in extremely serious penalties, are indistinguishable from those obtained under ordinary criminal laws. If the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases. [Id. 207-08]
> ... deciding to treat criminal contempt like other crimes insofar as the right to jury trial is concerned, we similarly place it under the rule that petty crimes need not be tried to a jury. [Id. at 210]...
> If the penalty authorized by the legislature is more than six months, the crime is a serious crime and the defendant is entitled to a jury trial (even though the judge may impose a sentence of less than six months. [Id. at 211]

When *Bloom* was decided a petty offense was defined by 18 U.S.C. § 19 as an offense for which a sentence of less than six months can be imposed. This Court in *Taylor v. Hayes*, 418 U.S. 488 (1974) held a citizen charged with a "petty offense" was not entitled to a jury trial.

Taylor is no longer applicable because the punishment for criminal contempt was increased and re-classified by the adoption of Sentencing Guidelines.

Criminal Contempt Is No Longer A Petty Offense After 1984

18 U.S.C. § 1(3) defined a "petty offense" as "any misdemeanor that the maximum imprisonment does not exceed 6 months or a fine in excess of $5,000.00." 18 U.S.C. § 1(3) was repealed by the Omnibus Crime Act, Public Law 98-472, Title II, § 218(a)(1) October 12, 1984. The definition of a "petty offense" was replaced by 18 U.S.C. § 19 and 18 U.S.C. § 3559 Classification of Offenses.

Post-1984, 18 U.S.C. § 19 defines a "petty offense" as a Class B or Class C misdemeanor, or infraction, that is punishable by a fine not greater than the amount set forth in 18 U.S.C. § 3571(b)(6) or (7), i.e. $5,000.00. Under the Post-1984 definition of "petty offense", any offense, including criminal contempt, that includes imprisonment for any period is no longer a "petty offense".

18 U.S.C. § 401 criminal contempt has no maximum term of imprisonment or fine. *Brown v. U. S.*, 359 U.S. 41 (1959), rehearing denied 359 U.S. 976. Sentences for criminal contempt of over one year and up to ten years have been upheld as "reasonable." *See United States v. DiPaolo*, 804 F.2d 225 (C.A.2, 1986)(10 years); *U.S. v. Green*, S.D.N.Y.1956, 140 F.Supp. 117, affirmed 241 F.2d 631, certiorari granted 77 S.Ct. 1057, 353 U.S. 972, 1 L.Ed.2d 1135, affirmed 78 S.Ct. 632, 356 U.S. 165, 2 L.Ed.2d 672(3 years)(three years); *U.S. v. Papadakis*, 802 F.2d 618 (C.A.2, 1986)(5 years); *U.S. v. Green*, 630 F.2d 566, (C.A.8 1980) certiorari denied 449 U.S. 904(2 years); *Nilva v. U.S.*, 227 F.2d 74 (C.A.8, 1955)(1 year and a day)

In *Lewis v. United States*, 518 U.S. 322, 326 (1996) this Court held "[T]o determine whether an offense is petty, we consider the maximum penalty attached to the offense."[9] 18 U.S.C. § 401 is not a "petty offense", as defined by 18 U.S.C. § 19, because 18 U.S.C. § 401 does not limit the fine to a maximum of $5,000.00 as required by 18 U.S.C. § 19 and § 3571(b)(6) and (7); 18 U.S.C. § 401 does not define the offense as a Class B or C misdemeanor; and 18 U.S.C. § 401 does not limit the maximum punishment under § 3559(a)(7) to six months or less.

Petitioner acknowledges *Lewis* discussed the pre-1984 case of *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) that permitted the actual sentence imposed to control whether the defendant was entitled to a jury trial when the legislature has not specified a maximum penalty. The *Lewis* Court, however, did not consider Congress' judgment reflected in the 1984 amendments for the definition of a petty offense under 18 U.S.C. § 19; the definition of a felony under § 3559; or USSG § 2J1.2 subjecting obstruction of justice to a 24-30 month sentence.

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[9] The maximum sentence for the offense in *Lewis* was six months making it a Class B misdemeanor. The Court held that even though there were more than one count, the potential of a consecutive sentence did not change the nature of the crime.

§ 401 Criminal Contempt Is A Felony Pursuant To The Sentencing Guidelines[10]

The 1984 Ominous Crime Act, *supra*, also established the Sentencing Guidelines. The Sentencing Commission determined, in Application Note 1 to § 2J1.1, that:

> Because misconduct constituting contempt varies significantly ... the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to § 2J1.2 (Obstruction of Justice) for that guideline to apply.

An essential element of 18 U.S.C. § 401 was that Petitioner obstructed the administration of justice. USSG § 2J.1.2(b)(2) "Obstruction of Justice" has a specific offense characteristic that "If the offense resulted in substantial interference with the administration of justice, increase by 3 levels."

In *United States v. Voss*, 82 F.3d 1521 (C.A.10, 1996) the Tenth Circuit held that USSG § 2J1.2(b)(2) "obstruction of justice" was to be applied to criminal

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[10] Petitioner acknowledges the risk of this argument, i.e., Petitioner is tried for a felony at a new trial. Petitioner had practiced law for 37 years without a complaint or discipline. Petitioner has been honored nationally for his trial skills; his mentoring and education of other attorneys; his legal achievements; and his contributions as a criminal defense attorney. Petitioner's law practice since the events of November 17, 2006 has been destroyed. At 63 years of age it is unlikely Petitioner will ever regain what has been lost. Chief Judge Curtis L. Collier has already appointed a new judge from his division of the Eastern District to retry Petitioner. Petitioner would rather face trial for a felony before a jury than be tried again by a Judge who sits in the same district with Judge Greer and on the same bench with Judge Collier.

contempt of court with its Guideline level of 17 and resulting guideline sentence of 24-30 months. *accord United States v. Price*, 30 Fed. Appx. 333 *10 (6th Cir. 2002)

Thus, pursuant to 18 U.S.C. § 3559 (even pre-*Booker*), Congress provided that violations of 18 U.S.C. § 401 were felonies punishable by more that one year with a guideline sentence of 24-30 months. Clearly Petitioner had a Sixth Amendment right to a jury trial for a felony with a guideline sentence of 24-30 months.

Post-*Booker* the question becomes whether sentencing is "reasonable" where Judge Greer ruled pre-trial he will vary 75% below the minimum guideline sentence to a maximum of six months for the purpose of denying Petitioner a jury trial.

No 18 U.S.C. § 3553(a) sentencing factor permits a sentencing Judge to vary below the 24-30 "heartland" guideline sentence before trial for the purpose of denying a defendant a jury trial. There is no procedure in *United States v. Booker*, 543 U.S. 220 (2005) or its progeny for a district judge to determine prior to trial that a "reasonable sentence" for the purpose of denying the defendant a jury trial is six months or less instead of the guideline sentence of 24-30 months.

Conclusion

The Petition should be granted for this Court to consider the Sixth Amendment right to a jury trial in the context of this Court's opinions in *Jones, Apprendi* and *Blakely*.

The Petition should also be granted for this Court to review its prior cases in the context of the repeal of prior petty offense definition and the sentence and the

classification of criminal contempt under the Sentencing Guidelines.

III. Petitioner was denied his structural constitutional right to an impartial judge by having his defenses at a new trial limited by the Sixth Circuit.

Petitioner moved to disqualify Judge Greer from presiding over his criminal contempt trial pursuant to Fed. R. Crim. P. 42(a)(3) and 28 U.S.C. § 455(a), 455(b)(1) and 455(b)(5)(iv).

Petitioner filed numerous statements made by Judge Greer before and after the events of November 17, 2006 but before Petitioner's criminal contempt trial that established Judge Greer harbored a §455(b)(1) bias against Petitioner or, at a minimum, statements that "might reasonably question his impartiality" under §455(a).[11]

The Sixth Circuit Opinion held that Judge Greer was disqualified pursuant to Fed. R. Crim. P. 42(a)(3) because Petitioner's conduct "involved disrespect . . . toward the judge."[12] The Sixth Circuit, then, based on the record that had been created before Judge Greer, while he was disqualified, ordered that Petitioner's new trial

> should be unencumbered by any of the arguments in Mr. Moncier's brief to this Court. We have considered all of those arguments, and with the

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[11] Judge Greer said at Petitioner's sentencing that he believed Petitioner's contempt may be his "legacy as a federal judge".

[12] The Sixth Circuit Opinion either failed to address or pretermitted numerous other statements and materials filed by Petitioner pursuant to 28 U.S.C. § 455 to disqualify Judge Greer.

> sole exception of the one made under Rule 42(a)(3), we reject all of them on the merits. [Pet. Appx. Opinion, p. 10]

Judge Greer admitted he believed Petitioner's conduct involved disrespect to him. His own statements established pursuant to Fed. R. Crim. P. 42(a)(3) that he was disqualified.

A fair reading of the Sixth Circuit Opinion appears to express regret by the Court being required to reverse because of the clear provisions Fed. R. Crim. P. 42(a)(3). Respectfully, the Opinion further appears to express excuses for Judge Greer failing to disqualify himself under the rule. In fact, the Sixth Circuit Opinion praised Judge Greer for attempting to "rise above taking personal offense by Mr. Moncier's conduct toward him" and found it was an "ironic consequence that [Petitioner] gets a new trial." [App. Opinion, p. 10]

Respectfully, the Sixth Circuit Opinion treats Fed. R. Crim. P. 42(a)(3) as a technicality. What the Opinion fails to recognize is that Fed. R. Crim. P. 42(a)(3) conduct "involving disrespect to the judge" also requires disqualification pursuant to 28 U.S.C. § 455(a) and the Code of Conduct for United States Judges because the attorney's disrespect might reasonably question the Judge's impartiality. Further, a judge trying a person for actions involving disrespect toward the judge, is disqualifying pursuant to 28 U.S.C. § 455(b)(1) because the allegation of an attorney's disrespect might reasonably call into question whether that judge has a personal bias or prejudice concerning the defendant.

Trial by a judge who is not impartial is not a "technicality" but is a constitutional "structural defect" in the criminal proceeding:

> We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S., at 23, 87 S.Ct., at 827. The right to an impartial adjudicator, be it judge or jury, is such a right. Id., at 23, n. 8, 87 S.Ct., at 828, n. 8, citing, among other cases, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge).

Gray v. Mississippi, 481 U.S. 648, 668 (1987)

Due process requires recusal of a judge who has become personally embroiled in a controversy and cannot therefore adjudicate it fairly. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-466, (1971).

Likewise, a trial judge should not preside over a criminal contempt proceeding against an attorney where the trial judge has permitted himself to become "personally embroiled" with the defense attorney throughout trial. *Offutt v. United States*, 348 U.S. 11, 17, (1954). As stated in *Offutt* Judges should not sit:

> [I]n judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feelings against the lawyer.. . .The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance.

Offutt v. United States, 348 U.S. 11, 17, (1954)

The inquiry is "not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that

the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'" *Ungar v. Sarafite*, 376 U.S. 575 (1964). "Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. 133, 136, (1955). The fact that an appearance of bias is sufficient to warrant disqualification underscores the elemental truth that in a judicial proceeding appearances do matter. *Offutt v. United States*, 348 U.S. 11, 14, (1954).

> The disqualification calculus does not concern what is in the mind of the judge, nor does it prescribe some subjective test by which one might measure the probability of bias or prejudice. Instead, it says that a judge should be disqualified from a proceeding where the circumstances raise reasonable questions about his impartiality, regardless of his state of mind or ability to conduct a fair and impartial hearing.

United States v. Griffin, 84 F.3d 820 (7th Cir.1996).

The issue presented is not whether Judge Greer was disqualified. The Sixth Circuit held Judge Greer was disqualified. The issue presented is what effect the Sixth Circuit, or a subsequent judge, can give to the record created before Judge Greer when he was disqualified.

In this case, based on a record created before a disqualified judge, the Sixth Circuit Opinion, without specifically addressing Appellant's claims on appeal, held that Petitioner's retrial "should be unencumbered by any of the arguments in Mr. Moncier's brief to this court. We have considered all of those arguments, and with the sole exception of the one made under Rule

42(a)(3), we reject all of them on the merits." [App. Opinion, p. 10]

To Petitioner's knowledge, This Court has not previously recognized jurisdiction of an Appellate Court to make rulings based on a record created before a disqualified judge.

Petitioner requests this Court to grant the Petition to hold that because there was a constitutional structural defect in the proceedings, the proceedings were void and of no effect and that the legal effect of a proceeding being void is that the proceeding did not occur.

Petitioner further requests this Court grant the Petition to hold that an appellate court, or any subsequent trial court, does not have subject matter jurisdiction to make any rulings based on a void proceeding including those made by the Sixth Circuit denying Petitioner's defenses at a new trial.

CONCLUSION

For the reasons stated the Petition should be granted.

Respectfully submitted,

HERBERT S. MONCIER
Counsel Of Record
550 W. Main Street, Suite 775
Knoxville, Tennessee 37902
(865) 546-7746
Supreme Court Bar # 146330

February 22, 2010 *Counsel for Petitioner*